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Doctrines and Problems Relating to U.S. Control of Transnational Corporate Concentration

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The Committee of Experts on Restrictive Business Practices for the Organisation for Economic Cooperation and Development (OECD) has recently published a report on corporate concentration among OECD member states.¹ The OECD report, which was four years in preparation, has drawn on data supplied by nine member states. Among its conclusions are the following:

1. Substantially more increases than decreases in concentration occurred in Canada, Germany, Japan, and the United Kingdom, and in the industries analyzed by the EEC;
2. In the United States, over the period 1958 to 1972, concentration tended to remain stable in already highly concentrated industries but increased in the low to medium concentrated industries in a sample of 183 comparable manufacturing industries . . . ;
3. The relationship between industry concentration and growth confirmed the theoretical prediction that at high rates of growth, concentration decreased, but that at low to medium growth rates, concentration tended to increase;
4. In general, the evidence of most studies is that high [arguably monopoly] profits are associated with concentrated industries;

The views expressed are entirely those of the authors and do not represent an official position of any agency of the U.S. government.

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5. Imports did not restrain the ability of larger firms to raise their margins relative to the smaller firms unless there was a very high degree of import penetration;² and
6. One United States study found that a two firm concentration ratio of 35 percent or more correlated significantly with high price/cost margins. Structure itself "as measured by different concentration ratios explain more than about one-fifth of the variance in industry price/cost margins."³

Given this evidence it is not surprising that "high or rapidly growing levels of concentration are increasingly becoming a matter of concern in many countries,"⁴ including the United States. However, a subject of intense controversy within the United States has been with what should U.S. anti-trust authorities be concerned, how concerned should they be, and how reliable are the data on which concerns are based. The greatest controversy surrounds the question of whether aggregate industrial concentration in modern societies is increasing rapidly and dangerously. According to David G. Gill of Exxon Corporation, a member of the Business and Industry Advisory Committee to the OECD which monitors official OECD activities, no inference should be drawn from the OECD report that aggregate concentration is becoming a problem.⁵

While it is generally conceded that the problem of aggregate concentration is controversial among antitrust experts,⁶ as well as the general public, it is perhaps less well appreciated whether (and to what extent) there is a problem in the United States of intraindustry concentration (concentration among the manufacturers of the same goods) and if it is itself controversial. The conclusions of the OECD report are at variance with those of other analysts.⁷

It is the principal thesis of this article that important recent case decisions in U.S. antitrust law reflect just this conflict over the extent to which intraindustry (horizontal) concentration is economically harmful. We are at a point where the future direction of the law is difficult to discern. Until there is greater U.S. policy agreement, and consistency within U.S. law itself, it is unlikely that any common transnational response will emerge to even horizontal corporate concentration. Ironically, it may not be possible to clarify U.S. antitrust law as long as the underlying policy conflict remains so sharp. For the present, there is an impasse in the United States regarding the question of corporate concentration.

The initial section of this article focuses on some existing legal impasses in the United States with respect to concentration (1) by mergers between manufacturers of the same product, especially where the failing company's defense and considerations of potential competition are involved, (2) by technology licensing between noncompeting firms manufacturing comparable products, and (3) by traditional and shared monopolies.

Four topics, deserving attention in a more comprehensive analysis, will not be discussed. The first of these is conglomerate mergers. Conglomerate mergers have generally been permitted under U.S. antitrust law. Since they promote aggregate concentration, they are subject to criticism by those who see aggregate concentration as a danger. As already indicated, there is enough controversy over the problem of horizontal concentration to leave this even more divisive topic to others.⁸

The second topic is vertical mergers. While conceptually distinct and the subject of a large literature in its own right,⁹ a vertical merger may frequently be analyzed in the same manner as a horizontal merger between a potential competitor and an existing firm in an industry. In vertical merger cases, customer or supplier enterprises are often the most likely actual or perceived potential entrants into a particular product market.

The third excluded topic is transnational corporate concentration by private international cartel.¹⁰

The fourth topic is the role of governments in promoting corporate concentration through the implementation of anticompetitive laws and policies. It is sufficient to point out that governments often undo with one hand what they undertake with the other. As antitrust authorities from several nations are considering how concentration might be lessened to promote competition, others in these same governments are devising programs to increase concentration and stabilize markets, sometimes in the service of the same ultimate objective of greater productivity and allocative efficiency.

Next, the article touches more briefly on a few of the special problems of applying United States law to foreign firms operating within the United States and to U.S. transnational enterprises operating in foreign countries. United States antitrust enforcement policy seeks evenhanded application of U.S. law to foreign as well as domestic enterprises.¹¹ However, this is not always possible because of special problems raised by (1) the so-called extra-territorial assertion of U.S. jurisdiction where doing so conflicts with important laws and policies of other nations, (2) the difficulties in obtaining relevant information from foreign jurisdictions, (3) the difficulties of obtaining effective relief from excessive concentration outside one's sovereign territory, and (4) the erosion of the "potential competition" doctrine in recent decisions by the United States Supreme Court.¹² These problems combine to give foreign enterprises certain advantages over domestic enterprises in avoiding U.S. antitrust regulation.

The Conclusion shows that given the current impasse in U.S. antitrust enforcement against horizontal concentration, especially where it involves conduct beyond our shores, there are no imminent prospects for defining transnational enforcement standards or establishing transnational enforcement institutions. Nonetheless, some modest transnational collaboration is possible and desirable to clarify policy choices and build a foundation for future progress.

THE CONCENTRATION PART OF THE PROBLEM OF
TRANSNATIONAL CONCENTRATION

The identification of a concentration problem is founded on the assumption that if one or a few firms acquire the power to control prices as to distinct products in a geographically-defined market, competition will be suppressed, product quality will decline (as will the range of consumer choice and producer productivity, including the development of new technology), and prices will reflect some degree of monopoly profits. On the other hand, other considerations may tend to vitiate the characterization of industrial concentration as a problem. For example, large-scale markets and production experience may increase rather than decrease efficiency; industrial competition in a high-growth phase may consolidate the industry into a few strong competitors with the weakest firms having to drop out; in the international setting, domestic concentration may be necessary and therefore desirable in order to maintain an internationally competitive position. There is as yet no strong consensus on either the characterization of concentration as a problem, or on what approaches to the problem so defined are most effective.

Nonetheless, U.S. antitrust law takes a certain cognizance of industrial concentration as a problematic phenomenon. The prototypical illustration of this phenomenon in the antitrusters' demonology is that of the U.S. steel industry over the course of this century. Antitrust authorities sometimes view the relative concentration and lack of competition in the steel industry as a primary cause of its present state of technological retardation and resultant difficulty in competing with imported steel.¹³

Statutory Overview

Three principal antitrust statutes are directly relevant to the effort to deal with this problem of concentration, but Section 7 of the Clayton Act is probably the most powerful tool in the antitrust regulatory regime.¹⁴ Section 1 of the Sherman Act¹⁵ and Section 5 of the Federal Trade Commission Act¹⁶ require evidence of conspiracies in restraint of trade or unfair trade practices respectively, in order to obtain remedial prohibitions. Similarly, Section 2 of the Sherman Act¹⁷ requires a showing of affirmative action to obtain or restrain market power by exclusionary or predatory conduct.¹⁸

Section 7 of the Clayton Act, however, only requires evidence that a corporation engaged in commerce in the United States is seeking to acquire another and, by so doing, may substantially lessen competition or tend to create a monopoly. Moreover, when applied prior to the consummation of an acquisition, Section 7 permits quick, clean, and effective relief to avert anti-competitive effects by prohibiting the merger. One of the many vexing problems subsumed by the general issue of concentration is that of formulating an appropriate remedial order for anticompetitive mergers that have already been consummated between firms of significant size in a concentrated market.¹⁹

Mergers Between Producers of the Same Product

Although Section 7 seems to be, in theory, the most effective of the present antitrust statutes, its enforcement by the Justice Department appears to be declining. According to an unpublished study by the Antitrust Division there were twenty-three Section 7 prosecutions filed by the Department of Justice in 1969, sixteen in 1973, and only eleven in 1979.²⁰ The meaning of this decline is unclear. At least as to horizontal mergers between actual competitors, the decline may be a reflection of the only locus of consensus on horizontal concentration doctrine—the general validity of the 1968 Merger Guidelines of the Department of Justice (Merger Guidelines).²¹ The Merger Guidelines, twelve years ago, announced that they are to be read “only as a statement of current Department policy, subject to change at any time without prior notice”²² and, of course, are not binding on courts.

Nonetheless, not only the Antitrust Division and Federal Trade Commission (FTC), but also the courts and private antitrust practitioners have been heavily influenced by the relative clarity and precision of the guidelines. Illustrative of this precision is the instruction given in the guidelines for analyzing a possible merger by one of the four largest firms making a product as to which they share 75 percent of a geographic market. According to the guidelines, if the acquiring firm possesses a 4 percent market share, the Department of Justice will ordinarily challenge the acquisition of a competitor with another 4 percent market share.²³ If the acquiring firm's share is 15 percent, then an acquisition of a firm with only a 1 percent market share is likely to be challenged.²⁴

Since September 5, 1978, when the premerger regulations went into effect, companies with substantial sales into, or assets within, the United States must give prior notice to federal antitrust enforcement agencies when planning to merge.²⁵ Of the approximately sixty proposed transnational mergers referred to the Foreign Commerce Section of the Antitrust Division, during the first eighteen months of this new notification requirement, only one involved firms with proportionate market shares close to the standards set forth in the guidelines. In fact, only three raised any substantial antitrust question at all and none of these appeared, based on traditional enforcement considerations, to warrant prosecution.²⁶

It appears that this consensus in merger law was formed largely because of the conclusion by the private antitrust bar and its clients that the standards are reasonable and reduce uncertainty in business planning.

Professor William James Adams has identified two distinct modes of analysis for reviewing mergers. He calls one “competition as a quasi-goal of society.” The other is “competition for the sake of efficiency.” According to the former, competition is always desirable. According to the latter, competition is only desirable when it yields net benefits.²⁷ This distinction strikes to the heart of the current debate over horizontal concentration. If antitrust lawyers, their clients, and judges conclude that some horizontal mergers

involving a big firm in a concentrated market are economically beneficial ("competition for the sake of efficiency") the present consensus on the validity of the guidelines may dissolve. In fact, there already is evidence that the consensus is eroding in two special horizontal merger situations.

Acquisition of the "Failing Company"

The first involves the acquisition of an allegedly failing company. Where the firm to be acquired is likely to withdraw from the market by ceasing operations, it is no more anticompetitive, in many instances, to let another firm buy it out than to let it go under. The Merger Guidelines state that the department will accept the defense only where the firm to be acquired has (1) "depleted resources," (2) only "remote prospects for rehabilitation," and (3) made "good faith efforts . . . to elicit a reasonable offer of acquisition more consistent with the purposes of Section 7."²⁸

How badly off must the acquired firm be? How hard must it try to find a more eligible suitor? In *General Dynamics*,²⁹ the Supreme Court may have suggested that it will entertain arguments about the lack of competitive harm from a merger which violates the Merger Guidelines, especially where the acquired firm is competitively weak, with depleted resources, even if not failing. In that case the acquired company owned substantial coal reserves that were committed under long-term requirements contracts. Because the reserves of the acquired firm were spoken for, the Court concluded that the acquisition was not anticompetitive.

In a recent decision, *United States v. International Harvester Co.*,³⁰ the Seventh Circuit read *General Dynamics* to permit a merger of two companies with more than 20 percent sales in the concentrated market for high-powered farm tractors. Apparently, the court felt that while the acquired company, Steiger, was not failing, it was competitively weak for lack of adequate access to funds for investment. Since *Harvester*, the purchaser of 40 percent stock interest in Steiger, had a deep pocket, the court reasoned that the acquisition would serve Steiger's needs.³¹

Department of Justice officials have criticized this decision and its suggestion that the failing company defense is now reduced to a "weakened competitor" defense.³² They correctly point out that the Supreme Court in *General Dynamics* did not conclude that the contractual commitment of its coal reserves made the acquired firm a weak competitor. It only concluded that the committed reserves were not a factor in the market and that the relevant product market was properly narrowed to reserve coal mining capacity for future sales.³³ There is now a direct conflict between two circuit courts and the issue remains for future resolution.

Acquisition by a Potential Competitor

The second horizontal situation in which there appears to be erosion of the Merger Guidelines involves acquisitions by potential future (but not present)

competitors. According to the guidelines, the threat of entry, either through internal (de novo) expansion or toehold acquisition of a small firm already present, "may often be the most significant competitive limitation on the exercise of market power by leading firms, as well as the most likely source of additional actual competition."³⁴ In two important decisions, one domestic—the *Marine Bancorporation* case,³⁵ the other international—the *British Oxygen* case,³⁶ some doubt has been cast on the vitality of that proposition.

In *Marine Bancorporation*, the Supreme Court established two tests for a successful challenge to an acquisition of one firm by another based on the acquirer being an actual potential entrant by de novo or toehold entry. First, there must be proof that the entrant could feasibly enter the market by other routes. Second, and more demanding, there must be proof that entry by another route would have a "substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects."³⁷ Implicitly, by setting this condition, the Supreme Court adopted what Adams has called the "competition for the sake of efficiency" mode of concentration analysis. However, the Department of Justice in the Merger Guidelines usually employs the "competition as a quasi goal of society" standard.³⁸ Competition is thought to be facilitated when unjustified concentration is frustrated. It is not necessary, appropriate, or even perhaps possible to demonstrate that the acquirer will clearly establish a significant independent presence in the market if its acquisition plans are blocked. The Supreme Court's test puts the law enforcer in the perverse position of having to know better than the acquirer itself what its true prospects are for entry by means other than acquisition. It would make more sense to put the burden of proof on the acquirer to justify why independent entry is not feasible. Either way, this decision makes a departure from the clear structural guidelines of excessive horizontal concentration—a major purpose and benefit of the guidelines.

At present, the law of potential competition—especially as to transnational mergers—is at an impasse. In *British Oxygen*, the world's second largest producer of industrial gases—with no prior sales in the United States—acquired the third largest producer, Airco (a U.S. company), that occupied 16 percent of a product market in which the top three firms held 60 percent of the market.³⁹ In upholding the acquisition, the Second Circuit found that the Federal Trade Commission did not show that British Oxygen was a potential entrant in the reasonably near future. The court held that a showing of "eventual" entry was not sufficient.⁴⁰ While not discussed in the opinion, it is worth noting that both the British government and the European Commission filed papers with the court supportive of the merger, arguing that foreign potential entrants are handicapped by cultural and social barriers that make independent entry even more difficult for them than for domestic potential entrants.⁴¹ This decision would lead one to expect easy access to American markets by major foreign firms acquiring large American firms.

However, a recent decision by the Federal Trade Commission indicates

that the issue has not been finally settled. In the *Matter of Brunswick Corporation*,⁴² involved a joint venture to manufacture less expensive outboard motors. One of the partners was Brunswick. Its Mercury Division had approximately 20 percent of the market⁴³ which made it the second largest of four domestic manufacturers jointly occupying 95 percent of the market.⁴⁴ The other partner was the Japanese firm Yamaha. Yamaha manufactured and sold outboard motors everywhere in the world but the United States—the largest market.⁴⁵ Yamaha was already established as a successful seller of motorcycles and snowmobiles throughout the United States, but had failed twice before to penetrate the outboard motor market de novo.⁴⁶ The FTC found (on relatively compressed analysis) that by 1973 Yamaha had the technology to compete effectively in the United States.⁴⁷

Late in 1972, the two firms had formed a joint venture, Sanshin, to make outboard motors in Japan. These were to be marketed in Japan under a Yamaha label and in the United States under a Mariner label. The joint venture was for a period of ten years with automatic three-year renewals (unless revoked with three years' notice).⁴⁸ The FTC decision found that the three burdens of proof imposed by the decisions in *Marine Bancorporation* and *British Oxygen* had been met. First, Yamaha's technical capability and market experience demonstrated the feasibility of its entry.⁴⁹ De novo entry was found to be possible through (1) its national network of motorcycle and snowmobile dealers, (2) private label mass merchandisers, or (3) camping and sports supply stores.⁵⁰

Second, the likelihood of significant procompetitive effects was found in Yamaha's overall financial strength, development of an advanced motor, successful expansion history worldwide, and intention to compete effectively at the time the joint venture was entered.⁵¹

Finally, the FTC took the fact of the joint venture itself as proof that Yamaha was an imminent potential entrant.⁵²

There is a second potential competition theory besides that of actual potential entry. It is the theory of the perceived potential entrant "waiting in the wings" as a threat of competition, keeping present competitors from giving in to the temptation of oligopoly or collusive pricing.⁵³ This theory for control of concentration is even more tenuous, as it depends upon perceptions that are subjective and therefore likely to be ambiguous if enough people are canvased. Nevertheless, the FTC explicitly held that Yamaha alone among noncompeting enterprises was able "to inspire the fear of competition in the hearts of U.S. manufacturers" before it entered the joint venture.⁵⁴

The case is now on remand to the Administrative Law Judge for a relief determination, since the Commission had reversed the initial decision on liability. The difficulty reconciling *Brunswick* with *British Oxygen* suggests that the potential competition doctrine will stand or fall on the weight given to particular facts of particular adjudications. By applying the three conservative tests of liability and finding it as to a nonpermanent joint venture (even

where Yamaha had twice previously failed to effect de novo entry) the FTC has boldly attempted to reestablish the vitality of the position taken in the Merger Guidelines—that is, competition as a quasigoal of society.

Whether or not the potential competition doctrine is applied in U.S. law, can have a profound impact upon the U.S. domestic economy as well as the transnational economy. If foreign enterprises that are only potential competitors are virtually free to make horizontal domestic acquisitions, the trend toward foreign takeovers in U.S. markets is stimulated at a time when U.S. companies appear to be substantially undervalued. It also suggests the possibility that international concentration by merger may reach problem proportions before concentration reaches the trigger point in any national market. Consider a hypothetical case of a Canadian acquirer not competing in the U.S. market which acquires a U.S. target not selling in Canada. The Canadian firm is the fifth largest in Canada, and the U.S. firm is fifth largest in America. There would be no increase in the five-firm concentration ratio in either Canada or the United States, but there may be a significant increase in concentration in the aggregate North American market.

Concentration by Technology License

The preceding discussion of the *Brunswick* case demonstrates that many of the effects of a merger, including anticompetitive concentration, can be achieved by joint venture.⁵⁵ The same is true of technology licensing by one firm to another, or reciprocally, where the effects of the arrangement may be not only the reduction of competition *inter se* but the reduction of significant consumer choice in the product market generally.

In this area of the law there is something of an impasse as to what types of technology-sharing arrangements between large firms in concentrated markets should be and are illegal. Three current and contradictory theories of excessively anticompetitive concentration are discernible.

The first, and most dubious, is reflected in the most recent decision to consider the issue. In *United States v. Westinghouse Elec. Corp.*,⁵⁶ Judge Weigel held that a fifty-year-old reciprocal know-how agreement between two billion-dollar worldwide enterprises (Westinghouse and Mitsubishi), as to virtually their full line of hundreds of electrical products, was not illegal even though the two enterprises generally did not compete in each other's home market and the agreement had so provided. His decision was based on two considerations: (1) it is necessary to prove anticompetitive intent to render such an agreement illegal, *regardless of the anticompetitive effect*,⁵⁷ and (2) no such intent is shown here because the most plausible explanation for the failure of Mitsubishi to sell in the United States in competition with Westinghouse is fear of infringing on Westinghouse patents.⁵⁸

The first consideration, as the Department of Justice has argued on appeal to the Ninth Circuit,⁵⁹ flatly contradicts the Supreme Court decision in *National Society of Professional Engineers v. United States*, which held

that the legality of agreements must be tested against their effect on competition.⁶⁰ Judge Weigel's second finding is undercut by the fact that the case was decided immediately after the government presented its case, before the defendants had introduced specific evidence showing that there were Westinghouse patents actually blocking Mitsubishi sales. There is no precedent for imposing on the plaintiff the burden of proving the negative—in this case, that patents must have blocked licensee entry into the U.S. market.⁶¹

An alternative theory of liability is argued by the United States on appeal.

A major manufacturer in a highly concentrated market may not repeatedly renew broad, multiproduct, multipatent license agreements that have the effect of disabling major potential competitors from providing badly needed additional competition in the United States.⁶²

In its brief, the United States offers evidence demonstrating that Mitsubishi, but for the long-term, multiproduct license, was an actual potential entrant into the U.S. market. It argues that:

The court need not determine how long competitors may renew patent license agreements before the antitrust laws are violated. There is no single answer to that question. Rather, under a rule of reason analysis, the answer in each case will depend on the economic factors relevant to the parties and markets involved. The issue in this case is, however, whether the restraints imposed for over fifty years can now be justified as reasonable in light of the relevant present day economic realities.⁶³

The caution of this statement suggests that reciprocal licensing agreements between large firms in concentrated markets that may have a restrictive effect may still be legal if their duration is somewhat less than fifty years or covering a somewhat smaller range of products than several hundred. Recent experience of the senior author in Department of Justice decision making in the technology licensing area demonstrates that this has been the recent enforcement philosophy of the department. The department has not filed a single suit following up on its theory in the *Westinghouse* case. Such a view encourages long-term restrictive technology-sharing agreements between the largest transnational enterprises, even in oligopolistic industries. While such licensing does promote some efficient dissemination of technology, one wonders whether the disincentives to independent research in concentrated industries, stemming from dependence on a licensor effectively eliminated from the competitive market for perhaps two or three decades, do not outweigh the benefits of collaboration.

The Department of Justice appeared to take a more aggressive position in its *Antitrust Guide for International Operations*, now more than three years old.⁶⁴ The essential problem in this area of antitrust enforcement is

determining whether a licensee could become a competitor of the licensor without the benefit of the license. Recognizing this problem as others have,⁶⁵ the guide suggests that it may be relevant to ask whether the restraint on competition exceeds "the time it would take [for the licensee] to develop equivalent know-how itself (the reverse engineering period)."⁶⁶ Unfortunately, this "reverse engineering" test begs the question. There is no objective or precise measure of the reverse engineering capability of a licensee. Perhaps the most effective approach for exercising greater control over excessive concentration by technology licensing would be to shift the burden of proof to the licensing parties where the territorial restraint exceeds a period of, say, fifteen years, and the parties are large, well-financed, technologically sophisticated, and operating in noncompetitive industries with significant barriers to entry.⁶⁷

Confusion as to which of these three antitrust enforcement approaches to restrictive technology licensing (or yet another) will be used in the future reflects the conflict between Adams's two modes of competition analysis.⁶⁸ Those who believe that seeking competition for itself increases the economic efficiency of a society will probably favor a policy to limit restrictive technology licensing between large potentially competitive enterprises. On the other hand, those who believe that many technological problems are too difficult and too costly for efficient competitive solutions, will tend to favor a less aggressive policy. Again, there is something of an impasse.

Traditional and Shared Monopolies

The word *control* in describing existing concentration in the United States is a misnomer. Dealing with concentration per se as a restraint of trade or a monopoly is difficult under the Sherman Act and the Federal Trade Commission Act. When monopolies do violate statutes, however, traditional U.S. antitrust theory is not content with mere restraint of the monopoly power. The earliest antitrust cases made it clear that the primary purpose of Sherman Act Section 2 is to break up, dissolve, or dissipate monopoly power. In the 1911 *Standard Oil* case, the Supreme Court recognized that remedial relief must not only prevent the conduct that created and maintained a monopoly, but eliminate the monopoly and restore or recreate competition in the affected market.⁶⁹ The National Commission for the Review of the Antitrust Laws and Procedures (Commission), recently supported this view.⁷⁰

In its January 1979 report the Commission urged the use of structural relief in Section 7 and Section 2 cases.⁷¹ The Commission's report relied on two major factors to support this view. First, the commissioners agreed that structural relief is more effective in restoring competition to an affected market. If the only relief is an injunction prohibiting certain conduct, the concentrated market will remain; subsequent abuses will be likely, since the basic market conditions persist, and no court could possess the foresight to enjoin all possible forms of abuse that a monopolist may contrive. Second,

use of structural relief avoids the need for continuing judicial or administrative supervision of a monopolist to determine whether it is abusing its position or engaging in various practices designed to enhance its position in the market.⁷²

One question that was not addressed by the Commission is whether the need to maintain international competitiveness should be a defense to an order of dissolution. For example, under Japan's comparable antitrust statute, the Japanese Fair Trade Commission may not order divestiture when it may make it "difficult for the firm to maintain international competitiveness."⁷³ This issue has not yet been raised in a U.S. antitrust case.⁷⁴

The Commission emphasized that persistent monopoly power, except in extraordinary circumstances, can be maintained only by culpable conduct.⁷⁵ This accords with the view expressed in *Alcoa*⁷⁶ and *United Shoe*,⁷⁷ among others, that monopoly power itself creates a presumption of culpable conduct which can only be rebutted by evidence of superior skill and foresight. As a result, a number of the commissioners believed that the requirement that conduct to enhance or maintain power should be eliminated by legislation, so that evidence of persistent monopoly power would lead to dissolution unless significant economies of scale were shown.⁷⁸ Others believed it was important to retain the conduct element.⁷⁹ Nevertheless, the commissioners agreed that persistent monopoly can only be maintained by culpable conduct.⁸⁰

Some recent cases indicate that the trend is just the other way; that is, U.S. courts may be more willing to tolerate monopolies and are raising the burden of proof accordingly for those attacking such power. The courts appear most tolerant of monopoly power when design changes or product innovations are involved. California Computer Products (CalComp) recently sued IBM for appropriating its market share in peripheral equipment that CalComp manufactures to fit into IBM's central processing units.⁸¹ IBM manufactures both the central units and the peripheral equipment itself. CalComp was in the business through the process of reverse engineering, whereby it would buy a product from IBM, break it down and copy it, and then undersell IBM since IBM's research and design costs were avoided. IBM made design changes that effectively prevented CalComp from competing on the peripheral units for new machines. Some of the design changes, such as integration of the add-on functions into the main unit, meant not only a lag time, but that CalComp could not compete at all.

The Ninth Circuit Court of Appeals rejected CalComp's argument that these technological manipulations violated the antitrust law.⁸² CalComp argued that the changes did not improve performance, but the court found both cost savings to the consumer and improved performance in the new units.⁸³

The recent Second Circuit Court of Appeals decision overturning most of the district court's award in *Berkey Photo v. Eastman Kodak*,⁸⁴ presents a similar case. In 1972, Kodak introduced the 110 photographic system, including a camera and new film format to go with it. Those companies, in-

cluding Berkey, that manufactured cameras using film provided by Kodak, could not immediately compete with Kodak's new camera, and Berkey claimed that Kodak had unlawfully monopolized the market. The 110 system had been an immediate success, and Kodak's market share for amateur cameras did not fall below 50 percent for four years.

Berkey presented evidence that the new film product was actually inferior (at least initially) to existing products. The court avoided making any determination of the value of the new product, deciding that this was a matter of individual taste. The important question for the court was whether some coercion was involved.⁸⁵ Was the desire to use the new format motivated by desire to impede competition? The court found no evidence that Kodak attempted to persuade customers to purchase the 110 camera because it was the only camera that could take the new film.⁸⁶ The court concluded there was no coercive behavior and no violation of the antitrust laws.

In neither of these cases did the court seek to assess the value of the new product. Both courts indicated that the antitrust laws are aimed at unreasonable business behavior such as predatory pricing or coercive practices. In *CalComp*, the court concluded that price cuts by IBM were not predatory since they were profitable to IBM and were responsive to competition from the peripherals manufacturers such as CalComp.⁸⁷

The Commission report also urged the courts to take a tougher stand in "attempt to monopolize" cases, under Section 2 of the Sherman Act. The Commission was primarily concerned about the approach taken in *United States v. Empire Gas*,⁸⁸ where the conduct was particularly anticompetitive, but was not actionable since the defendant's market share was not large enough to present a "dangerous probability of success" of monopolization of the market.⁸⁹

The Commission concluded that a legislative change to clarify the "dangerous probability" requirement may be necessary,⁹⁰ because the Supreme Court has declined to reconcile various circuit court decisions that have construed the "dangerous probability" requirement differently.⁹¹ The Commission's proposed legislation would require courts, in determining the existence of a dangerous "risk" of monopoly, to weigh several factors including the defendant's intent, its present or probable market power, and the anticompetitive potential of the conduct involved.⁹² Moreover, under the proposal, the evidence by defendants that prices were not below average variable or marginal cost would not be an absolute defense, but just another factor to be considered.⁹³

Successful prosecution of an "attempt to monopolize" case is most difficult because of the burden of proving a "dangerous probability of success." Inasmuch as courts evince greater tolerance of monopoly power, they may also increase the existing burden of proof for attempt cases. These concerns are evident in the FTC action against *Dupont*,⁹⁴ in which it is alleged that Dupont was employing illegal strategies to expand its production of titanium dioxide to meet or capture all growth in the market. These strategies in-

cluded pricing low enough to prevent other companies from expanding production and refusing to license its technology, which permitted DuPont to preserve its technological advantage over competitors.⁹⁵ The administrative law judge agreed that DuPont would probably acquire a monopoly share, but refused to hold any of DuPont's actions to be unfair or unreasonable. The opinion concluded that even if DuPont knew it would gain a monopoly share, such knowledge was not enough to turn legitimate business conduct into an illegal practice or to presume an intent to lessen competition or create a monopoly.⁹⁶

Another current problem in U.S. antitrust law concerns shared monopolies. Justice Department officials⁹⁷ acknowledge that antitrust theorists differ on the nature and extent of the problem, and whether it is structural⁹⁸ or behavioral;⁹⁹ some theorists warn that enforcement agencies should distinguish between contrived and natural oligopolistic pricing;¹⁰⁰ still others argue that there is no problem at all.¹⁰¹ The concern of the Antitrust Division is that a few dominant firms in a market, aware of their oligopolistic interdependence, may also be able to coordinate their decision making so as to achieve a monopolylike level of performance without an overt agreement.

The Antitrust Division has had underway for more than two years a systematic examination of concentrated industries in the United States.¹⁰² Several concerns have motivated the division to undertake this study. First, concentration improves the firms' ability to coordinate behavior leading to anticompetitive results. In order to circumvent the rigors of competition, these firms must be able to reach some consensus as to the right noncompetitive price structure. In addition, they must be able to detect rivals who might otherwise succeed in gaining increased profits by undercutting the consensus price.¹⁰³

Concentration alone may not be enough to enable the firms to coordinate their activities. These firms may have to adopt *facilitating mechanisms*, which the Antitrust Division has defined as any practice (often developed over time and perhaps even serving a legitimate business purpose) which facilitates interdependent or cooperative behavior.¹⁰⁴ Facilitating mechanisms will vary within each industry. An illustration of the type of activity that may be classified as a facilitating mechanism can be found in the Westinghouse-GE consent decree entered with the United States in 1976.¹⁰⁵ Westinghouse and GE made available to each other current price and other competitive information through price books containing simplified procedures for pricing turbogenerators, along with a multiplier that could be used to determine the price each would use in any given sales situation. Both also introduced price protection policies designed to ensure treatment to all customers, but also published outstanding orders and price quotations. As a result, both companies had a means to coordinate prices and avoid accidental or intentional price undercutting.

Shared monopolies appear to be a matter of considerable concern outside the United States as well. The Treaty of Rome establishing the European

Economic Community contains a provision addressed to abuses of a dominant position by one or more enterprises.¹⁰⁶ A bill is pending before the Canadian Parliament that would authorize civil review of *joint monopolization*, defined as any situation where a small number of firms account for more than 50 percent of a relevant market and pursue closely parallel policies.¹⁰⁷ Japan recently enacted a law that presumes an industry to be monopolized when the market share of one company exceeds 50 percent or the combined share of two companies exceeds 75 percent.¹⁰⁸ In 1978, the Japanese Fair Trade Commission announced that twenty-six lines of manufacturing industries were considered in a state of monopoly or shared monopoly.¹⁰⁹ At present, there is very little practical experience with these laws, but interest in shared monopoly among various antitrust agencies appears to be increasing.¹¹⁰

United States antitrust agencies are acquiring more extensive information about concentration through the recently enacted premerger notification requirement of the Clayton Act.¹¹¹ These notification requirements extend to certain foreign transactions, including those involving major foreign sellers doing business in the United States or those with significant assets located here.¹¹² The Hart-Scott-Rodino Act (the Act) does not cover all acquisitions or mergers that should be reviewed by antitrust authorities. Rather the Act purposely limited the reporting requirements to the activities most likely to raise antitrust concerns. Thus, obtaining information about trends in concentration as such, both here and abroad, will only be assisted partially by this mandatory requirement.¹¹³

THE TRANSNATIONAL PART OF THE PROBLEM

If little agreement exists on the definition of the concentration problem, there is even less on what assertions of extraterritorial jurisdiction are considered appropriate to limit transnational concentration. That, in essence, is the transnational part of the problem. The Justice Department's active enforcement of the antitrust laws in U.S. foreign commerce has met some resistance, especially from foreign governments. The most recent *causes célèbres* involved the so-called international uranium cartel and the North Atlantic shipping case.¹¹⁴ A corollary of the jurisdictional problem is that the difficulties of enforcing U.S. antitrust law over foreign enterprises, especially when they do not operate in the United States, sometimes gives such enterprises a type of antitrust immunity that domestic enterprises do not enjoy.¹¹⁵ Largely in response to the uranium and shipping cases, the British government has recently adopted legislation that increases the powers of the British Secretary of State to prevent compliance with foreign (read United States) demands for evidence or other orders that offend British jurisdiction or sovereignty, limits enforcement in Great Britain of foreign antitrust and multiple damage judgments, and (perhaps of most interest) enables British persons and companies

to recover damages paid under foreign judgments in excess of actual damages to the foreign plaintiff.¹¹⁶

The problem, of course, is not new. Laws blocking foreign access to evidence have been on the books in Great Britain and elsewhere for some time,¹¹⁷ and the Australian government recently prohibited the enforcement of foreign antitrust judgments that offend its jurisdiction and sovereignty.¹¹⁸

Two suggestions seem in order. First, as State Department Legal Adviser John Stevenson noted in 1970,

In the overwhelming majority of cases, where problems [of jurisdiction] have arisen they have not been the result of invalid exercises of jurisdiction but rather of two valid, conflicting exercises of jurisdiction.¹¹⁹

Antitrust cases have generally not been brought either by enforcement agencies or private parties unless there was a substantial U.S. connection.

Second, the objection of foreign countries is often not to the extraterritorial application of U.S. law *per se*, but rather to its unilateral application. Where international agreement exists, even the United Kingdom applies its law extraterritorially.¹²⁰ The contracting parties of the General Agreement on Tariffs and Trade (GATT) permit the application of each others' antidumping and countervailing duty laws to conduct abroad and generally permit the gathering of evidence by other countries in their territories in order to enforce these laws.¹²¹

Unfortunately, the differences among nations (even our major trading partners) regarding antitrust enforcement have made similar agreements in the antitrust field impossible. The recently concluded 1979 OECD Council Recommendation on Cooperation in Restrictive Business Practices Affecting International Trade calls for member states to cooperate with foreign investigations where national laws and national interests permit.¹²² Even this constructive step forward necessitates a sometimes painful case-by-case approach that is not always successful in resolving conflict.

The shipping and uranium cases illustrate these points. In the former, heavy fines were assessed against a number of U.S. and foreign firms and individuals for fixing rates and otherwise restraining competition among them in the North Atlantic shipping trade. Since the case involved shipments to and from U.S. ports there was little question that the U.S. government had jurisdiction in a legal sense; U.S. antitrust authorities have the power, and we believe the right, to set and enforce rules for the conduct of those who wish to do business in the United States. However, the United States was not the only country with both a direct interest in the activity and legitimate jurisdiction to regulate it. Foreign governments argued, as they have persistently done in the past, that the United States should not unilaterally regulate this inherently international industry.

In the case of the so-called uranium cartel, certain foreign governments in 1972 sponsored the establishment of an international arrangement for the

setting of floor prices for uranium exported by their domestic producers. This was in response to an embargo imposed by the United States against all importation of uranium for U.S. domestic consumption, which eliminated well over half the world's uranium market for foreign producers. There was some evidence that the cartel had an indirect effect on uranium prices in the U.S. domestic market, and that members of the cartel attempted to prevent U.S. middleman uranium dealers from selling uranium abroad. The Department of Justice conducted an extensive grand jury investigation into the activities of the cartel and brought a criminal prosecution against the Gulf Oil Corporation.¹²³ It did not, however, sue the foreign members of the cartel.

In both of these cases, foreign governments resisted all attempts by the grand juries to obtain evidence in their countries. Nonetheless, substantial evidence was obtained from documents located within the United States and in the case of the uranium cartel, from inspection of documents obtained from Australia by the environmental organization Friends of the Earth.

The Justice Department's decision in the uranium case not to take criminal action against the foreign defendants, over which it believed it had jurisdiction, was taken primarily because of considerations of comity¹²⁴ that weighed against the application of U.S. antitrust law to foreign participants in the cartel.¹²⁵ Among the factors leading to this conclusion were: (1) the impact of the uranium cartel on United States commerce was not found to be substantial, (2) the cartel was formed pursuant to clear and important policies of the involved foreign states, and (3) these policies sought the reasonable objective of preserving foreign uranium industries from the otherwise devastating blow of the protectionist U.S. uranium import embargo. However, a different standard was applied to Gulf because its first obligation as a U.S. corporation was to comply with the law of the United States and it could be expected to be aware of and to act in conformity with that law.

Transnational mergers and joint ventures can raise similar problems. On the whole, U.S. law enforcement in this area has been quite circumspect. This is due in part to considerations of comity and to the fact that Section 7 of the Clayton Act applies only to mergers between firms that are actually engaged in U.S. commerce.¹²⁶ However, several additional factors are involved when one or both parties to a merger are foreign companies. First, differences in language and custom, and uncertainties connected with foreign trade and investment, constitute additional barriers to entry into the U.S. market; foreign companies are thus less likely to be considered potential competitors. This may have been a factor in the *British Oxygen* decision¹²⁷ as well as in a recent FTC decision not to oppose the acquisition by J. I. Case Company, (a subsidiary of Tenneco) of the French firm Poclain. Case proposed to acquire a 40 percent interest in Poclain assuring control of its U.S. assets (including a U.S. subsidiary). The Poclain group of companies is Europe's largest manufacturer of heavy construction equipment. However, the firm was in some financial difficulty.¹²⁸ Both Case and Poclain produced hydraulic excavators and cranes, though Poclain had not produced or sold

these products in the United States. The French government had approved the acquisition, presumably to increase the economic vitality of an important French manufacturing entity.

Considerations of comity, the importance of the merger to the French economy, as well as the improbability that a foreign company in financial difficulty would enter the U.S. market, may have led to the FTC's decision to permit the merger.

In another instance, the Justice Department objected to a proposed international joint venture, despite the significant adverse impact its decision had on the interests of two foreign governments. Pratt & Whitney of Canada and Rolls Royce of Britain proposed a joint venture whose purpose was to produce an executive jet engine largely for sale in the United States.¹²⁹ Pratt & Whitney of Canada was a wholly owned subsidiary of United Technologies, a U.S. firm. The Justice Department found that United Technologies and Rolls Royce were the two largest manufacturers of jet engines in the non-Communist world, and the world market was very concentrated. The Justice Department reasoned that these two companies could each produce the engines and that the joint venture would preclude potential competition between them. It rejected the argument that the venture was so costly that independent development was unlikely. It also rejected the argument that there already were several viable competitors in the market who would remain unaffected by the joint venture. While this was true, the combination of the Rolls Royce and Pratt & Whitney names was likely to overwhelm the less well-known competitors.

This decision led to abandonment of the venture, thereby frustrating a significant investment in Canada that would have been welcomed by the Canadian government. One could argue that the United States should have ignored this joint venture, since Pratt & Whitney Canada was not a U.S. company. But it was wholly owned and controlled by United Technologies; there was every reason to treat them as one entity. This economic unit notion, though objected to by many foreign governments, is not exclusively American.¹³⁰ Furthermore, the original joint venture proposal brought to the department involved a Pratt & Whitney plant in the United States. It appears that the Canadian plant was suggested as a new location for manufacturing after the U.S. situs joint venture was rejected. It should be pointed out that while the Justice Department opposed this joint venture it approved a more speculative and costly collaboration between Rolls Royce and United Technologies to produce a different size jet turbofan engine.

Second, U.S. antitrust enforcement against foreign enterprises is also somewhat limited by the difficulties in obtaining evidence abroad. The British bill¹³¹ is a reminder that foreign governments can and do block U.S. enforcement efforts. In many merger and joint venture cases, the involvement of one U.S. firm will be a sufficient avenue to challenge the transaction; this is especially true since the Premerger Notification Law¹³² gives U.S.

agencies the chance to investigate and obtain information concerning proposed mergers and joint ventures. Further, the Justice Department now has the power to issue Civil Investigative Demands to persons abroad.¹³³

When a U.S. agency or court serves compulsory process on a foreign party, and that party, acting in good faith, is prohibited by local law from complying with it, one nation's interests must give way. U.S. courts have so far held that the relative interests must be weighed and that, where the foreign national interest is strong, and the consequences for the private party under the foreign law for compliance are severe, they will often not require compliance.¹³⁴ This problem further differentiates the application of U.S. antitrust laws between U.S. and foreign firms operating in transnational commerce.

Finally, there is sometimes a problem in formulating an appropriate remedy in international merger cases. If a U.S. firm proposes to merge with a foreign firm or enter into a joint venture with it, this can be easily enjoined. However, if two foreign firms with no U.S. affiliates combine, there may be no practical way to attack the transaction, even if one or both parties have substantial sales in the United States. Suppose, on the other hand, that both these foreign firms have U.S. subsidiaries that have a relatively small share of the U.S. market that is, however, subject to scrutiny under the Justice Department's Merger Guidelines. Should the United States and other countries in similar positions require divestiture of the U.S. subsidiaries? Again, a weighing of the relative interests in the transaction may hold the only principled solution.

Because of all these factors—comity, jurisdiction, additional barriers to entry, evidence, and remedies—U.S. antitrust laws concerning economic concentration affect domestic firms more than foreign firms. Whether this places U.S. companies at a disadvantage vis-a-vis their foreign competitors here or abroad is beyond the scope of this brief discussion. It should be remembered, however, that U.S. companies are generally free to conduct joint operations in foreign markets and to merge with foreign firms if in the process they do not restrain or tend to suppress competition in the United States.

The clearer problem is that these factors substantially increase the uncertainties of antitrust analysis, a problem aggravated by the fact that decision making is not centralized. Antitrust enforcement involves not only the Department of Justice and the FTC, but also the courts and sometimes other agencies. Moreover, private suits may be filed regardless of whether the government takes any action. In both the uranium and shipping cases, massive treble damage actions are underway¹³⁵ and, in the shipping case, the Federal Maritime Commission is investigating whether the alleged arrangements violated the Shipping Act of 1916.¹³⁶

It has been argued that antitrust enforcement in foreign commerce should be treated as an element of U.S. foreign economic policy and should be handled by diplomacy rather than by legal process.¹³⁷ This would work a substantial modification, both procedural and substantive, of the antitrust

laws as they apply to foreign commerce. It is, quite frankly, unlikely to occur. However, it may be that, at a minimum, the federal government should take a more active role in private litigation. In certain cases, it may be appropriate for the government to provide its views to the courts on questions of jurisdiction and comity through *amicus curiae* briefs. This could promote a more consistent U.S. approach in an area of great concern to our allies and to the United States. To date, the federal government has hesitated even to appear to take sides in private suits; however, some cases may have such international economic and political significance that they should become the legitimate concern of the executive branch.

CONCLUSION

While we have tried to demonstrate that the lack of consensus within the United States, and among other nations, on what is and is not the concentration problem is a fundamental impediment to the establishment of transnational standards or institutions for addressing it, there is still a basis for present collaboration leading to possible future consensus. At the least, increasing horizontal and aggregate concentration leads to new economic relationships and dependencies that may in some respects be both less efficient and more harmful to important social and political values. Accordingly, these phenomena should be better measured and understood.

The OECD report¹³⁸ may be a watershed document. If it is possible to agree that obtaining a better understanding of the nature and impact of industrial concentration is a shared problem for developed countries, then a necessary basis for further international collaboration will be established.

Five developing stages of international collaboration are possible. The first stage is expanding the collection and reporting of concentration data within the various nation states. The OECD report recognizes this objective as essential to further action. It suggests that:

- (a) Concentration statistics should be expanded by, for example, calculating several different measures, and by introducing new size variables, studying enterprise and local concentration, defining industries more finely, taking into account foreign trade, and by studying concentration outside the industrial sector; . . .
- (c) studies should be undertaken into the relationships between the structure of an industry and its behavior and performance; and
- (d) where Member countries have not produced concentration studies, they should either undertake such studies themselves or encourage private research into the causes and effects of concentration . . . ¹³⁹

The second stage is sharing, comparing, and analyzing data across national boundaries. If the Japanese experience is relevant to U.S. law enforce-

ment and vice versa, more uniform data and data gathering is necessary, as are institutions to collect and disseminate this information, such as the OECD, GATT, UNCTAD and the U.N. Centre on Transnational Corporations, as well as private research bodies. There is a clear and disconcerting absence of relevant comparative data and important analytical studies of industrial organization.¹⁴⁰ Furthermore, only recently have U.S. antitrust enforcers (and even more recently, a handful of private U.S. antitrust lawyers) agreed that something can be learned from foreign antitrust experience. Foreign data should be utilized in more U.S. analysis and foreign legal developments should be referred to more frequently in developing U.S. enforcement policy and common law jurisprudence.

The third stage is compiling information on and reflecting upon industrial concentration in international markets. Progress in the first two developmental stages will facilitate this process. Such action may assist U.S. antitrust authorities in determining appropriate enforcement policy as to concentration in the U.S. submarkets of larger world markets, such as the automobile industry. The OECD Steel Committee, acting independently of the work of the Restrictive Business Practices Committee, is accumulating and analyzing such aggregate data to assist member states in coping with the international economic difficulties of that industry.¹⁴¹ The International Energy Agency is performing a similar task as to the world oil industry.¹⁴² Further progress at this stage requires greater willingness to share data across national boundaries and to accommodate the conflicting goals of promoting knowledge and progress on the one hand, while providing some protection to national security and private proprietary interests on the other.

The fourth stage is greater cooperation between nation states in facilitating the investigations and prosecutions of national enforcement agencies against transnational enterprises acting outside that nation's territory with a significant adverse impact within its territory. It is becoming increasingly clear that extraterritorial law enforcement is an inevitable and increasing fact of life in an interdependent world. Absent any extraterritorial enforcement, transnational enterprises possess the theoretical ability to at least partially evade the enforcement of laws of a nation affected by their conduct.

The main problem with extraterritorial antitrust enforcement is not so much that it is extraterritorial, but that it involves direct conflicts between sovereign jurisdictions over fundamental policies. If greater consensus does develop that there is a phenomenon of excessive concentration, it may be desirable for one nation to defer to the law enforcement efforts of another in particular instances for the purposes of gathering information across boundaries or asserting jurisdiction over one's nationals. This type of cooperation is increasing not only with respect to organized crime and drug smuggling, but also with respect to unfair trade practices as defined in the GATT codes.¹⁴³ While cooperation on international cartel activity would be expected to come sooner, this stage becomes plausible when the other three have been well established.

Finally, progress to that extent would make it possible to consider a joint enforcement effort by teams of enforcers from two or more national antitrust agencies, or even by employees of an international antitrust agency dealing with excessive concentration by transnational enterprises in several national markets. For those who consider this a utopian vision, consider what the Competition Directorate of the EEC has accomplished in just fifteen years. It has fleshed out a multilateral treaty into an organic body of developing case law—with strong common standards and multinational enforcement experience.¹⁴⁴ Twenty-five years ago, few scholars would have expected such progress for a joint antitrust agency working to promote competition among such a diversity of European states, *inter alia*, by increasing collaboration with national antitrust agencies.

The work of a distinguished political scientist, Inis Claude, suggests that this proposed agenda follows a fifty-year-old theory in international relations called *functionalism*.¹⁴⁵ Most fully developed by David Mitrany,¹⁴⁶ its cornerstone is the proposition that “a major prerequisite for the ultimate solution of political conflicts” is the development of ad hoc institutions of economic and social cooperation.¹⁴⁷ The Mitrany thesis should be acceptable to antitrust authorities who are skeptical about comprehensive planning for social and economic organizations. It is not yet possible to define clearly and commonly the *concentration problem*, let alone fashion a viable remedy for it; however, government officials can at least commit themselves to learn and share.

This volume may be an important early step on the road to cooperatively solving the problem, for it provides a basis in Mitrany's words for “. . . binding together those interests which are common, where they are common and to the extent to which they are common.”¹⁴⁸

NOTES

1. OECD, REPORT OF THE COMMITTEE OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES, CONCENTRATION AND COMPETITION POLICY (1979).
2. *Id.* at 130–38.
3. *Id.* at 138, citing KWOKA, JR., STAFF REPORT TO THE FEDERAL TRADE COMMISSION: MARKET SHARES, CONCENTRATION AND COMPETITION IN MANUFACTURING INDUSTRIES (1978).
4. *Id.* at 138.
5. OECD Document DAF/RBP/3798 transmitted to Experts of the Restrictive Business Practices Committee on October 16, 1979. A copy is reprinted *infra*, Annex 1.
6. See Ky P. Ewing, Jr., Deputy Assistant Attorney General, Antitrust Division, “Remarks on Where the Justice Department Is Heading and Why: Some Thoughts on Proposals for Conglomerate Merger Legislation,” Conference, New York City (June 22, 1979).
7. See, e.g., KAISER ALUMINUM & CHEMICAL CORPORATION, AT ISSUE: THE CONTROVERSY OVER CONCENTRATED INDUSTRIES (October, 1978).

8. Much of the current debate about the problem of conglomerate mergers centers on two pieces of legislation introduced by Senator Kennedy. See Boies, *International Implications of Limitations on Aggregate Concentration*, post. One is S. 600, the *Small and Independent Business Protection Act of 1979*, introduced March 8, 1979, 96th Cong., 1st Sess. The other is S. 1246, the *Energy Antimonopoly Act of 1979*, introduced May 24, 1979, 96th Cong., 1st Sess.
9. See, e.g., L. SULLIVAN, ANTITRUST 657-67 (1977).
10. J. Rahl, "International Cartels and Their Regulation," Columbia University Center for Law and Economic Studies, Conference on International Regulation of Restrictive Business Practices. (November 9, 1979) (Unpublished).
11. *Testimony on Foreign Investment in the United States: Hearings on S. 1284 Before the Subcomm. on International Trade, Investment and Monetary Policy of the Senate Comm. on Banking, Currency and Housing*. 94th Cong., 1st Sess. 3-17 (1975) (statement of Thomas E. Kauper).
12. See text accompanying notes 114-40, *infra*.
13. See, e.g., EXECUTIVE OFFICE OF THE PRESIDENT, COUNCIL ON WAGE AND PRICE STABILITY, A STUDY OF STEEL PRICES, Ch. 2 (1975); FTC, BUREAU OF ECONOMICS, STAFF REPORT ON THE UNITED STATES STEEL INDUSTRY AND ITS INTERNATIONAL RIVALS, Ch. 2, II and Ch. 4, I (1977); United States v. Columbia Steel Co., 334 U.S. 495, 534 (1948) (Douglas, J. dissenting); United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S.D.N.Y. 1958).
14. 15 U.S.C. § 18 (1976).
15. 15 U.S.C. § 1 (1976).
16. 15 U.S.C. § 45 (1976).
17. 15 U.S.C. § 2 (1976).
18. United States v. Grinnell Corp., 384 U.S. 563 (1966).
19. Elzinga, *The Antimerger Law: Pyrrhic Victories*, 12 J. L. & ECON. 43 (1969).
20. See ANTITRUST DIVISION WORKLOAD REPORT, submitted to the staff of the Senate Subcomm. on Antitrust Monopoly and Business Rights of the Comm. on the Judiciary 96th Cong., 1st Sess. (December 7, 1979) (unavailable at date of printing).
21. MERGER GUIDELINES OF THE DEP'T OF JUSTICE, 1 TRADE REG. REP. (CCH) ¶4510 (1968).
22. *Id.* at 6881.
23. *Id.* at 6884.
24. *Id.*
25. FTC, HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976—PREMERGER NOTIFICATION; REPORTING AND WAITING PERIOD REQUIREMENTS; 43 Fed. Reg. 33450 (1978).
26. This information is based on unpublished records retained by the Antitrust Division. During this eighteen-month period approximately 1,340 premerger notifications were received by the Antitrust Division as a whole.
27. Adams, *The "Economic" Analysis of Transnational Mergers*, post.
28. MERGER GUIDELINES, *supra* note 21, at 6884.
29. United States v. General Dynamics Corp., 341 F. Supp. 534 (N.D. Ill. 1972), *aff'd*, 415 U.S. 486 (1974).
30. 564 F.2d 769 (7th Cir. 1977).
31. *Id.* at 777.
32. *Testimony Concerning the Failing Company Defense before the Subcomm. on Antitrust, Monopoly, and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979) (statement

- of John H. Shenefield) (available from the Legal Procedure Unit of the Antitrust Division).
33. 415 U.S. at 506.
 34. MERGER GUIDELINES, *supra* note 21, at 6887-88.
 35. United States v. Marine Bancorporation, 418 U.S. 602 (1974).
 36. BOC Int'l Ltd. v. FTC, 557 F.2d 24 (2d Cir. 1977).
 37. 418 U.S. at 633 (1974).
 38. Adams, *supra* note 27.
 39. 557 F.2d at 25.
 40. *Id.* at 29.
 41. See J. Griffin, *Antitrust Constraints on Acquisitions by Aliens in the United States*, 13 INT'L LAW. 427 (1980).
 42. 3 TRADE REG. REP. (CCH) ¶ 21,623 at 21,773.
 43. *Id.* at 21,779.
 44. *Id.* at 21,782.
 45. *Id.* at 21,779.
 46. *Id.* at 21,778.
 47. *Id.* at 21,782.
 48. *Id.* at 21,779.
 49. *Id.* at 21,783.
 50. *Id.* at 21,784.
 51. *Id.* at 21,784-85.
 52. *Id.* at 21,783.
 53. United States v. Falstaff Brewing Corp., 410 U.S. 526, 532-33 (1973).
 54. In the Matter of Brunswick, 3 TRADE REG. REP. (CCH) ¶ 21,623 at 21,785.
 55. See text accompanying notes 129-30, *infra*, for a discussion of the proposed joint venture between Rolls Royce and Pratt & Whitney in the manufacture of two types of jet engines.
 56. 471 F. Supp. 532 (N.D. Cal. 1978).
 57. *Id.* at 537-38.
 58. *Id.* at 539.
 59. Brief for the Appellant, United States v. Westinghouse Elec. Corp., No. 79-4109 (9th Cir., filed July 13, 1979).
 60. 435 U.S. 679, 691 (1978).
 61. Brief for the Appellant, *supra* note 59, at 26-31.
 62. *Id.* at 32-33.
 63. *Id.* at 33 n.78.
 64. ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, GUIDE FOR INT'L OPERATIONS (1977).
 65. See especially, M. BLECHMAN, FOREIGN LICENSING MONOGRAPH, 27 *et seq.* (1977) (unpublished draft submitted to the Monograph Committee of the Antitrust Section of the American Bar Association).
 66. GUIDE FOR INT'L OPERATIONS, *supra* note 64, at 31.
 67. See, e.g., Turner, *Territorial Restrictions in the International Transfer of Technology*, TOKYO CONFERENCE ON INT'L ECON. AND COMPETITION POL'Y 151, 156 (1973).
 68. See Adams, *supra* note 27.
 69. Standard Oil Co. v. United States, 221 U.S. 1, 78 (1911).
 70. The Commission was organized in 1978 and directed by the president to study and make recommendations on ways to improve the conduct of large antitrust cases, including ways to improve relief in such cases.
 71. NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL 114, 119 (January 22, 1979) (COMMISSION REPORT). This preference for structural relief may be fundamental in U.S. antitrust law and theory, but it is not reflected in competition laws of other countries. Most of these statutes attempt to control the behavior of dominant firms; for the most part, they do not include provisions for directly attacking the power that has been abused.
See, e.g., the Treaty Establishing the European Community, No.

4300, U.N.T.S. Article 86, which proscribes abuses by one or more dominant undertakings within the Common Market or in a substantial part of it; Federal Republic of Germany's Act Against Restraints of Competition, Sections 22(1) and 22(2), discussed in Edwards, *American and German Policy Toward Conduct by Powerful Enterprises: A Comparison*, 23 ANTITRUST BULL. 83 (1978), which prohibits abusive conduct by dominant enterprises. Similar statutes can be found in the United Kingdom, the Netherlands, and Canada.

The antimonopoly law of Japan is a notable exception, in that it does provide for dissolution of monopolists, but only as a last resort if no other remedy would be sufficient, and not as the first remedy to be thought of in cases involving market power. ANTIMONOPOLY LAW OF JAPAN OF 1977 § 8-4 (Counselor's Office of Fair Trade Commission, ed.) (1977).

72. See, e.g., the decision entered in *United States v. United Shoe Mach. Corp.*, 391 U.S. 244 (1968) in which the Supreme Court granted the government's motion to add a divestiture provision to a decree entered ten years earlier. Discussed in COMMISSION REPORT, *supra* note 71, at 117-19.
73. ANTIMONOPOLY LAW OF JAPAN (1977), *supra* note 71, at § 8-4(1).
74. Boies, *supra* note 8.
75. COMMISSION REPORT, *supra* note 71, at 156.
76. *United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945).
77. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass 1953), *aff'd per curiam* 347 U.S. 521 (1964).
78. COMMISSION REPORT, *supra* note 71, at 158-59.
79. These commissioners believe that a "no conduct" standard might discourage firms with a near-monopoly position from undertaking legitimate competitive actions, and that the emphasis on proving efficiencies as a defense to structural relief would only protract litigation. COMMISSION REPORT, *supra* note 71, at 161-62.
80. COMMISSION REPORT, *supra* note 71, at 156.
81. *California Computer Products v. International Business Machine Corp.*, 1979-1 TRADE CASES (CCH) ¶ 62,713 (9th Cir. 1979).
82. *Id.* at 77,982.
83. *Id.*
84. 603 F.2d 263 (2d Cir. 1979).
85. *Id.* at 287.
86. *Id.*
87. *California Computer Products, Inc.*, 1979-1 TRADE CASES at 77,983.
88. 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).
89. Empire Gas threatened to put a competitor out of business if he refused to raise his prices, followed through with price cuts; refused to mail a distributor invoices so he could pay his bills, then on this pretense, refused to sell him the propane he needed. It also went door-to-door soliciting a competitor's customers by saying the competitor had gone out of business, even though the competitor had not. Although the court agreed that this conduct was anticompetitive, it concluded that there was no reasonable probability that Empire Gas would ever get much more than its existing 50 percent market share, primarily because of easy entry in the liquid petroleum gas retail business.

90. COMMISSION REPORT, *supra* note 75, at 150–51.
91. *See, e.g.,* Sulmeyer v. Coca Cola Co., 515 F.2d 835 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); Dearney & Trecker Corp. v. Giddings & Lewis, Inc., 452 F.2d 579, 579 (7th Cir. 1971), *cert. denied* 405 U.S. 1066 (1972); Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964), *cert. denied*, 377 U.S. 993 (1964).
92. COMMISSION REPORT, *supra* note 71, at 165–66. The word *risk* of monopolization rather than *probability* was used in order to avoid the implication that the term refers to a greater than 50 percent chance that monopoly will occur. *Id.* at 151.
93. *Id.* at 149–50.
94. *In re* E.I. duPont de Nemours & Company, No. 9108, FTC (filed Sept. 4, 1979), 3 TRADE REG. REP. (CCH) ¶ 21,613.
95. DuPont's records indicated it planned to extend its market share from 42 percent in 1977 to 53 percent in 1985.
96. DuPont, 3 TRADE REG. REP. (CCH) ¶ 21,613 at 21,750.
97. *See* Ky P. Ewing, Jr., Deputy Assistant Attorney General, Antitrust Division, "Remarks on Shared Monopoly and Concentration," Conference, New York City (December 1, 1978) (available from the Legal Procedure Unit of the Antitrust Division).
98. *Id.* *See, e.g.,* Weiss, "The Structure-Conduct-Performance Paradigm and Antitrust," presentation at the Conference on Antitrust Law and Economics, University of Pennsylvania, November 17, 1978; Qualls, *Stability and Persistence of Economic Profit Margins in Highly Concentrated Industries*, 40 S. ECON. J. 604 (1974); SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 184 n.3 (1st ed. 1971).
99. Hart, *A Forecast of Antitrust Policy Regarding Economic Concentration*, 10 ANTITRUST BULL. 51 (1965); Hart, *Restructuring the Oligopoly Sector: The Case for a New "Industrial Reorganization Act,"* 5 ANTITRUST L. & ECON. REV. 35 (1975) (Pt. 1); 6 ANTITRUST L. & ECON. REV. 47 (1972) (Pt. 2).
100. Winn & Leabo, *Rates of Return, Concentration and Growth—Question of Disequilibrium*, 17 J. L. & ECON. 97 (1974); Mancke, *Causes of Interfirm Profitability Differences: A New Interpretation of the Evidence*, 88 Q. J. ECON. 191 (1974); Weston, *Pricing Behavior of Large Firms*, 10 W. ECON. J. 1 (1972).
101. Handler, *Some Unresolved Problems of Antitrust*, 62 COLUM. L. REV. 930 (1962).
102. One purpose is to provide some information on concentration in the United States. Secondly, of course, the Division is interested in prosecutable cases. The initial survey began with a universe of 717 manufacturing industries in the United States selected on the basis of a four-digit Standard Industrial Classification, which possessed one or more five-digit product categories, and with a four-firm concentration ratio of 40 percent or more in 1972. Roughly one-half were excluded, either because they were not known to be shared monopolies, or because their SIC code did not constitute a product market in any reasonable antitrust sense. A year ago, the division announced that from these, approximately sev-

- enty product lines had been pegged for immediate inquiry; the remainder will be examined over time. Ewing, *supra* note 97, at 6–8.
103. *Id.* at 9.
 104. *Id.* at 11.
 105. United States v. General Electric Co., [1977–2] TRADE CASES (CCH) ¶¶ 61,659–60.
 106. *Supra* note 71; See Schroder, *Le Concept de Position Dominante dans l'Application des Articles 66 paragraphe 7 du Traite CECA et 86 Traite CEE*, in LA REGLEMENTATION DU COMPORTEMENT DES MONOPOLES ET ENTREPRISES DOMINANTES EN DROIT COMMUNTAIRE, (J.A. Van Damme ed. 1977) 186; Temple Lang, *Regulating Multinational Corporate Concentration: The European Economic Community*, *post*.
 107. Competition Act C–13, 30th Parliament, 3d Sess., § 29 (1977). See Gressman, *Canadian Merger Policy and Its International Implications*, *post*.
 108. Laws Concerning the Prohibition of Private Monopolization and the Preservation of Fair Trade, as amended, ANTIMONOPOLY LAW OF JAPAN, Ch. 1 § 2 (7) (1977).
 109. Japan Times, Nov. 30, 1977.
 110. A related issue is whether the use of a shared monopoly theory may bring about changes in “attempt to monopolize” law: Could certain conduct of a single firm be held an attempt to create a shared monopoly situation?
 111. 15 U.S.C. § 18 (1976).
 112. The application of the Act to foreign persons raises a number of issues. For example, will the full penalty of \$10,000 a day be imposed against a foreign person for each day of noncompliance? 15 U.S.C. § 18a(g) (1). Will there be secrecy problems: Where domestic companies alone are involved, there are confidentiality requirements. 15 U.S.C. § 18a(h). But where a foreign company is involved, will the initial inquiry be an “antitrust action” that requires notification to foreign governments under existing OECD notification and consultation commitments? Will there be an opportunity for consultation about the economic implications of pending mergers or acquisitions? This is not built into the statutory timetable for review.
 113. United States purchasers of foreign assets or voting securities are exempt from reporting unless \$10 million or more sales in or into the United States can be attributed to the acquired person in the most recent fiscal year. If a foreign issuer is acquired, the acquisition must be reported if, together with all the entities it controls, the foreign issuer holds assets located in the United States having an aggregate book value of \$10 million or more, or made sales in or into the United States of \$10 million or more in its most recent fiscal year. Certain investment assets and securities of another person are excluded from this computation.

Similarly, acquisitions by a foreign person must be reported if it acquires assets in the United States of \$10 million or more (excluding investment assets). Certain acquisitions by a foreign person outside the United States must be reported as well if it acquires voting securities of a foreign issuer which will give the acquiring foreign person either control of an issuer that holds assets in the United States of \$10 million or more, or control of a U.S. issuer with annual net sales or total assets of \$10 million or more. In addition, the acquisition must be

- reported if the aggregate annual sales of the foreign acquirer and the foreign acquired person in or into the United States total \$110 million or more, or if their aggregate total assets located in the United States total \$110 million or more. *Supra* note 25.
114. *United States v. Atlantic Container Line*, Crim. No. 79–271, 79–272 (indictment filed June 1, 1979, D.D.C.).
 115. As noted at p.17, weakening the vitality of the potential competitor doctrine can have the same effect.
 116. [1979] ANTITRUST & TRADE REG. REP. (BNA) F–1.
 117. *See, e.g.*, Business Records Protection Act of 1947, ONT. REV. STAT. c. 54 (1970); Netherlands Economic Competition Act of June 28, 1957 *as amended by* Act of July 16, 1958, Art. 39.
 118. Foreign Proceedings (Prohibition of Certain Evidence) Act of 1976, Austl. Acts. No. 121 (1976).
 119. *Extraterritoriality in Canada—United States Relations*, 63 DEP'T STATE BULL. 425 (1970).
 120. An example of this is the British export embargo to Rhodesia, *see* Southern Rhodesia Act, 1965, c. 76; Director of Public Prosecutions v. Doot, [1973] 1 All E.R. 940 (H.L.).
 121. *See generally* General Agreement on Tariffs and Trade, October 30, 1947, 61 Stat. (5) (6), T.I.A.S. No. 1700, 55 U.N.T.S. 194 (effective Jan. 1, 1948) *as amended* T.I.A.S. No. 1890; *Agreements Reached in the Tokyo Round of the Multilateral Trade Negotiation: Documents to the United States House of Representatives*, 96th Cong., 1st Sess. 257–307, 309–37 (1979) (*message from the president*).
 122. OECD Council Recommendation Document No. C(79)154 (1979).
- For a full text of this recommendation, *see* Stockmann, "Reflections on Recent OECD Activities: Regulation of Multinational Corporate Conduct and Structure," *post*. *See also*, Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, signed June 23, 1976, entered into force September 11, 1976, [1976] 27 U.S.T. 1956, T.I.A.S. No. 8291.
123. *United States v. Gulf Oil Corp.*, No. 78–123 (W.D.Pa.) (Crim. information filed May 9, 1978).
 124. The principle of comity is one of deference to the interests of foreign sovereign authorities where the application of one's own national law could work a disproportionate harm to those foreign interests. The principle is analogous to the "weighing of interests" test for resolving conflicts of law between the states of our federal system. *See, e.g.*, *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTINATIONAL PROBLEMS* 80 (1963). It is most clearly enunciated as to international conflicts between nation states in *Restatement (2d) of the Foreign Relations Law of the United States*. RESTATEMENT (2d) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 18, 39, 40 (1965). The Restatement provides that, among other factors to be taken into account are:
(b) *the extent and the nature of the hardship that inconsistent enforcement actions would impose . . .*,
(c) *the extent to which the re-*

- quired conduct is to take place in the territory of the other state,
(d) the nationality of the person, and
(e) the extent to which the enforcement of either state can reasonably be expected to achieve compliance of the rule prescribed by that state. *Id.* at §40.
125. *Testimony Regarding Department of Justice Uranium Investigation Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. (1980) (Statement of John H. Shenefield) (unavailable at date of printing).
 126. 15 U.S.C. §18 (1976).
 127. 557 F.2d 24; *See* text accompanying notes 39–41.
 128. It is not known whether the difficulty rose to the level of a possible “failing company defense”. *See* text accompanying notes 28–33, *supra*.
 129. Letter from then Assistant Attorney General Thomas E. Kauper to attorneys Phil E. Gilbert, Jr. and Thomas A. Dieterich, December 15, 1975, regarding two proposed joint ventures between Rolls Royce (1971) and United Technologies Corp.
 130. *See, e.g., Imperial Chemical Industries, Ltd. v. E.C. Commission*, [1971–1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8161.
 131. *Supra* note 116.
 132. 15 U.S.C. § 18a (1976).
 133. Antitrust Procedures Improvement Act, Pub. L. 96–90 Stat. 1383, §102 amending §3 of the Antitrust Civil Process Act (15 USC 1312)
 134. *See Societe Internationale v. Rogers*, 357 U.S. 197 (1958); *In re Westinghouse Electric Corp. Uranium Contracts Litigation*, Ancillary Proceedings, 563 F.2d 992 (10th Cir. 1977).
 135. *See, e.g., Uranium Trust Litigation*, MDL 342 (Westinghouse Electric Corp. v. Rio Algom Ltd., No. 76-C-3830) (N.D.Ill.); *In re Ocean Shipping Antitrust Litigation*, MDL 395 (S.D.N.Y. M–21–26–CES, [all cases]).
 136. 46 U.S.C. § 814 (1976); Order of Investigation August 14, 1979, Federal Maritime Commission Doc. No. 79–83.
 137. *See, e.g., Mann, Anglo-American Conflict of International Jurisdiction*, 13 INT. & COMP. L.Q. 1460 (1964).
 138. *Supra* note 1.
 139. *Id.* at 144.
 140. As the OECD report recommends, *id.* at 144, “concentration data should be made more uniform for the purposes of international comparison, since experience in other countries can be helpful in the development of [national] competition policy.”
 141. 14 WEEKLY COMP. OF PRES. DOC. 1915 (Nov. 1, 1978).
 142. INTERNATIONAL ENERGY AGENCY, OIL MARKET INFORMATION SYSTEM (1979).
 143. Multilateral Trade Agreements, *supra* note 121.
 144. *See, Temple Lang, supra* note 106.
 145. I. CLAUDE, SWORDS INTO PLOWSHARES: THE PROBLEM AND PROGRESS OF INTERNATIONAL ORGANIZATION 344–68 (3d ed. 1964).
 146. D. MITRANY, THE PROGRESS OF INTERNATIONAL GOVERNMENT (1933).
 147. *Supra* note 148, at 345.
 148. D. MITRANY, A WORKING PEACE SYSTEM 40 (1946).

ANNEX 1: REMARKS ON THE OECD CONCENTRATION REPORT

Remarks on the OECD report "Concentration and Competition Policy", by Mr. D. G. Gill, member of the group of Experts on Restrictive Business Practices of the Business and Industry Advisory Committee to the OECD, made to the members of the Bureau of the OECD Committee of Experts on Restrictive Business Practices at a meeting held on June 27, 1979. See Summary Record of the 36th meeting of the Committee, OECD Doc. No. RBP/M(79)1 at item XI.

OECD Report on Concentration and Competition Policy

I recently received the draft of chapter 4 dated 19 April. I have not had an opportunity to read the other sections of the OECD's study on concentration and competition policy and will confine most of my comments to those portions of the report dealing with the U.S.

I should note initially that, while the chapter contains a number of comments with which I disagree, overall I found much in the report with which I would agree. Paras. 4 and 5 discuss the many technical problems involved in measuring concentration, and I certainly agree with and endorse the description of the many great difficulties involved in this exercise. The problem, at least in the U.S., is that the data derives from different bases, is non-comparable over time, and includes non-comparable numerators and denominators. Usually, the data is contaminated: for example, foreign operations may or may not be included in numerators or denominators, and much non-manufacturing data is always included for manufacturing companies. The definitions of industries are extremely artificial. Many of my criticisms of the report stem from precisely these inadequacies. I note the following:

(1) Para. 11 observes that in the U.S. from 1958 to 1972 "concentration tended to remain stable in already highly concentrated industries but increased in the low to medium concentrated industries in a sample of 183 comparable manufacturing industries for which data were available". Many economists and university professors in the U.S. question whether any such trend is really observable. Betty Bock, Yale Brozen, Harold Demsets and Fred Weston are representative of the many economists in the U.S. who challenge the interpretations of concentration figures issued by the U.S. Department of Justice and the Federal Trade Commission.

(2) Para. 15 states that overall concentration in the U.S. in manufacturing increased significantly in the post-war period from 1947 to 1952. The report goes on to say that "most of this increase appears to have occurred in the early part of the period". In fact, when one looks at the data, the latter sentence is a clear understatement. The data (and I here refer to The Conference Board's 1978 study, p. 3, of The Relativity of Concentration Observations) show that the hundred largest U.S. firms grew not at all in their share of total value added by manufacturing during the period from 1963 to 1972.

The OECD report goes on to say that the percentage of total manufacturing assets held by the Fortune 500 largest industrial corporations rose from 73 to 83% from 1972 to 1977. In fact, the official statistics of the U.S., contained in the 1978 Statistical Abstract, at p. 576, show that the share of the 200 largest firms (no data is furnished for the 500 largest corporations) declined from 60% in 1972 to 58.4% in 1977. As my economist friends say, it is very difficult to observe much of a trend here.

(3) Para. 29 of the OECD report says that in the U.S. a considerable amount of research confirms Bain's finding of a positive correlation between concentration and profitability. I am sure that you are all aware that a considerable amount of research does *not* confirm Bain's "finding"; indeed, more recent and complete economic studies flatly reject it. I will here cite only Messrs. Brozen, Singer, Stigler and McGee. These and other academics have severely criticized the smallness and the lack of comparability of Professor Bain's sample. Indeed, when one examines the definition of "price-cost margin", one finds that it includes all sorts of things: taxes, overhead, depreciation, distribution expense, research and development, everything other than costs of materials and payrolls. Again, concentration statistics tend to be extremely artificial in both their components and interpretations.

(4) Para. 31 says that it is "apparent" that high concentration is increasing in the recent past. Most of the economists whom I have quoted would reject any such simplistic conclusion for the U.S. I call your attention to an interesting article on Aggregate Concentration, published last month by Betty Bock, Jack Farkas, Deborah Weinberger of The Conference Board. The Conference Board makes the obvious points about the inadequacies of the statistics, the non-comparability of numerators and denominators and the artificiality of the industry classifications. They also point out that the identity of the 50 or 100 or 200 largest manufacturing corporations changes from year to year. For example, between 1947 and 1977, 21 of the 50 largest in assets in 1947 had been replaced by other corporations by 1977. Eighty-five of the 200 largest in sales had been replaced by 1977. The pattern is similar for sales and assets for whatever group you chose to examine. Is it reasonable then to talk about the common characteristics of the 50, 100 or 200 largest corporations over a period of time when the identity of the group is changing? The Conference Board concludes by suggesting that "far from witnessing signals of agglomeration of corporate power in fewer and fewer hands—we are seeing data showing an apparent explosion above the standard cut-offs. And we are witnessing this proliferation without significant support from conglomeration or large-scale acquisition. Are we, then, viewing numbers that show increasing power in a few hands—or signals of a dispersion of size at the top?"

(5) Para. 43 states that studies in the U.S. "have concluded" that mergers account for a varying but significant proportion of increases in concentration. In fact, for the 200 largest corporations the annualized ratio of acquisitions as a percentage of change in assets varied from .60 of 1% in

1947–54 to 1.04% in the 1972–1977 period. The figures for all manufacturing corporations were somewhat lower but roughly equivalent in all periods. Para. 43 goes on to observe that conglomerate mergers have been increasingly in evidence as a percentage of merger activity in the U.S., a far from surprising phenomenon when one considers the enthusiastic and effective enforcement of the U.S. antimerger statute against horizontal and vertical acquisitions. Finally, the report goes on to suggest that the profits of the leading firms in concentrated industries tend to be higher than required to attract capital. The generality of this last observation almost defies analysis and, insofar as it is based upon price-cost margin figures, is virtually without meaning. As Betty Bock has observed, “until we have profit and concentration data that match, mechanical mating of the two types of information can produce only hybrid conclusions.”

(6) In conclusion, let me make three points:

- (a) The report observes that “in the absence of conclusive evidence on concentration and its effect”, we should all take note of the politically important point concerning the danger of centralization of power in the hands of a few enterprises. Fair enough—but perhaps equally relevant is the danger of the centralization of economic power in the hands of government and government ministries who regulate economic enterprises on the basis of hopelessly inexact economic data or interpretations thereof. Misleading or poorly interpreted data can provide a convenient excuse to those regulators who wish to substitute their personal social or political judgments in place of the economic judgment of the market.
- (b) One is also struck, in reading the report, at the lack of reference to international economic competition. Para. 3 mentions the relevance of such competition but then focuses on the various domestic markets which obviously have higher concentration ratios. In the U.S. context, for example, discussion of domestic automobile industry concentration ratios without reference to increasing international competition makes no economic sense at all.
- (c) In remarks last year at an antitrust seminar, Ms. Betty Bock cited an illustration to demonstrate her contention that economic theories based solely on structure and so-called objective economic statistics can be extremely dangerous. Some years ago the U.S. antitrust authorities, noting that the two top U.S. tire companies accounted for a high percentage of all tires manufactured in the U.S. and had previously lowered their prices for premium tires to the disadvantage of small competitors, brought a suit against the two companies, essentially claiming that they were behaving in a monopolistic fashion. After careful examination, the Antitrust Division, conced-

ing that it had failed to consider a number of very important factors in bringing suit, asked for the dismissal of the suit. These factors included such facts as the shift of tire buyers away from premium to regular brands and the presence in the tire market of the huge automobile companies which were the principal customers for tires. The presence of this countervailing customer power effectively regulated the tire manufacturers. The point I am making is that statistics and concentration figures alone are no substitute for adequate economic analyses.